No. 95-813

In The

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

vs.

MICHAEL SPEAR, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents' Brief on the Merits fails to offer any defense of the "zone of interest" rationale utilized by the Ninth Circuit in this case.[1] The brief also avoids both the zone of interest contentions advanced by the Government in the courts below (Gov't C.A. Br. 14-23; Gov't D.Ct.Rep.Br. 5-8) and the prudential standing questions upon which certiorari was granted by this Court.

Rather than defending the Ninth Circuit's reasoning, respondents try to bypass the questions in the petition for certiorari by arguing that the "proper disposition" of this case does not involve the application of zone of interest standing principles. (Res. Br. 15) To this end, they advance two arguments outside the scope of the questions upon which certiorari was granted; neither of which was resolved by the courts below: (1) that petitioners have failed to demonstrate Article III standing and (2) that, for reasons of statutory interpretation, petitioners' claims are not cognizable under the citizen suit provision of the Endangered Species Act ("ESA"). In addition, for the apparent purpose of deflecting the Court from the ESA, respondents also argue that a remedy may be available against federal "action agencies" under the Administrative Procedure Act ("APA") – although, they argue, no such remedy may be asserted against the Fish and Wildlife Service ("FWS") for its ESA activities. No such remedy exists in this case, they argue, because petitioners can point to no "final agency action" for purposes of an APA suit. The result of these arguments is that respondents would have the Court affirm the Ninth Circuit, albeit on different grounds, thus leaving the law of the circuit controlled by the

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[1] Indeed, respondents appear to have conceded that the Ninth Circuit was wrong when it concluded that because petitioners have no standing under the Endangered Species Act (16 U.S.C. 1531 *et seq.*) they also lack standing under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*). (Pet.App. 18) According to respondents' current position, plaintiffs such as petitioners *do* have a limited remedy under the APA against a federal "action agency" – although not in this case. (Res. Br. 46-49)

erroneous "zone of interest" analysis rendered below. Moreover, the chaotic split among the circuits on the applicability of prudential standing requirements to the ESA's citizen suit provision – which may have been a factor in the acceptance of this case for review – would remain unresolved.

Petitioners believe it is important to correct the law of the Ninth Circuit and to close the split which exists among the circuits on the application of zone of interest concepts to the ESA's citizen suit provision. This can occur, we believe, by reversing the Ninth Circuit for the reasons raised in petitioners' merits brief (Pet. Br. 17-44) – none of which are challenged by respondents. Petitioners also believe it is appropriate to address whether the present litigation presents a real "case or controversy" within the meaning of Article III of the Constitution. That issue *was* raised in respondents' opposition to certiorari (Cert. Opp. 9-11).

On the other hand, it would be *inappropriate* for the Court to attempt to resolve the statutory interpretation arguments in Part II of respondents' brief. None of the arguments raised therein are within the scope of the questions upon which certiorari was granted; none were resolved by the courts below and the half-page argument on cognizability of claims that appeared in respondents' opposition to certiorari (Cert. Opp. 11) failed to provide notice of the kinds of arguments respondents now attempt to present on the merits.[2] Accordingly, the Court should decline to address these issues in the first instance and, instead, remand for disposition by the courts below. (See, e.g., *Sullivan v. Everhart*, 494 U.S. 83, 95 (1990)) Such proceedings may, in fact, obviate the need to

[2] Nor was sufficient notice of respondents' arguments provided in the courts below. None of respondents' Part II arguments regarding the ESA's citizen suit provisions were raised in the district court. In the court of appeals, respondents *did* argue that the FWS cannot be sued for over-regulating for the benefit of endangered species (Gov't C.A. Br. 23-24) but provided no indication of the statutory interpretation contentions now raised in their merits brief.

give further consideration to the claims respondent has raised.[3]

Respondents' statutory interpretation arguments raise highly important and far-reaching questions of law whose resolution will have a substantial impact upon the administration of much of the nation's environmental legislation. In essence, respondents are striving to preclude citizen suit review of the discretionary activities of the agencies charged by Congress with responsibility for administering the ESA. As petitioners briefly explain herein, resolution of the statutory interpretation issues now raised by respondents is not nearly as easy or as uncomplicated as respondents would have the Court believe. Of equal importance, respondents' new arguments cannot receive a complete response by petitioners in the few pages available for that purpose in this necessarily brief reply.

Petitioners strongly suggest that this Court *not* attempt to resolve the statutory interpretation arguments which respondents have decided to raise in lieu of the "zone of interest" contentions they argued to the courts below. Instead, the Court should decide the standing issues resolved by the lower courts and upon which certiorari was granted and reverse the

[3] For example, insofar as the Government argues that an APA claim is not cognizable because there is no "final agency action," petitioners can allege, in good faith, that the Bureau did, in fact, comply with the 1992 biological opinion at issue in this case. Thus, if the current allegation in the complaint that the Bureau "will abide" by the biological opinion (Pet.App. 32) and the Bureau's commitment on the record to doing so (Res. Br. 27-28, n. 14) are insufficient to establish "final agency action," petitioners would almost certainly be granted leave below to allege actual Bureau compliance. The Government's cognizability objection would thus be resolved as a factual matter in the district court.

Whether petitioners have alleged a cognizable ESA claim under section 1540(g)(1)(C) for breach of a nondiscretionary duty is also a pleading issue that should not come before this Court until opportunity for amendment has been exhausted, particularly since the Government makes no claim that a plaintiff can *never* allege the breach of a nondiscretionary Secretarial duty under section 7 of the ESA.

Ninth Circuit's decision. Upon remand, the lower courts can consider respondents' statutory interpretation arguments in the first instance.

I. THE COMPLAINT AMPLY MEETS THE REQUIREMENTS FOR STANDING UNDER ARTICLE III

A. Because this case was dismissed at the pleading stage, the allegations of injury needed to satisfy Article III are minimal. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L.Ed.2d 351 (1992), the Court stated: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " (119 L.Ed.2d 351 at 364, see also, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). Here, this modest obligation is met by petitioners' allegation that, "The restrictions on lake levels imposed in the Biological Opinion *adversely affect plaintiffs* by substantially reducing the quantity of available irrigation water." (Pet.App. 40, emphasis added) Not only does such language allege injury to petitioners themselves (*Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)) it alleges that their injury results from respondents' conduct; *viz*, through restrictions on lake levels imposed in the biological opinion.

Respondents' assertion that petitioners must also raise allegations regarding the Bureau's allocation practices and the precise quantity of water they received as a result is, at best, premature. While it is reasonable to expect that "specific facts" will be set forth in affidavits in response to a summary judgment motion and that those facts will be "supported adequately by the evidence adduced at trial," (*Lujan v. Defenders of Wildlife*, *supra*, 119 L.Ed.2d at 365) this case is before the Court on a judgment of dismissal, not a summary judgment or judgment after trial. Petitioners have had no opportunity to produce affidavits much less conduct discovery regarding the Bureau's allocation practices. Moreover, respondents' related assumption that no cognizable injury, for Article III purposes, can arise from a reduction of water

supplies in the aggregate (Res. Br. 19) is simply incorrect. Not only has this Court found a reduction of water supply, in the aggregate, to be actionable (*Dugan v. Rank*, 372 U.S. 609, 623-25 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-54 (1949)); but even the Ninth Circuit has determined that the impairment of an irrigation district's *aggregate* contract right to water against the United States may amount to redressible injury capable of being asserted on behalf of the district's water users. (See *Madera Irr. Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir. 1993)).

B. Respondents argue, however, that the biological opinion did not "compel" the Bureau to operate the Klamath Project in accordance with minimum lake level restrictions and that even though the Bureau's operation is in accordance with the precise terms of the opinion, the "proximate cause" of petitioners' harm was a decision by the Bureau regarding the allocation of available water, not the biological opinion itself. (Res. Br. 22) For purposes of Article III standing, the issue is whether there is a "causal connection between the injury and the conduct complained of – the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' " (*Lujan v. Defenders of Wildlife*, *supra* 119 L.Ed.2d 351, 364; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The biological opinion is instructive in this regard. It describes the "Mitigation Measures" which the Bureau itself proposed for the Klamath Project to promote "the survival and recovery of the endangered species that exist in the Project area." (Pet.App. 21-31) Not one of these measures involves the imposition of restrictions on lake levels. Instead, the concept of maintaining minimum levels in Gerber and Clear Lake reservoirs originated, in its entirety, from the Reasonable and Prudent Alternative ("RPA") developed by the FWS. (J.A. 88-90) When respondents concede (Res. Br. 27-28, n. 14) that the Bureau decided to modify its intended operation of the Project to conform to the RPA even before the case was filed, they effectively concede that the dispute herein is "fairly traceable" to the FWS.

The Bureau's acquiescence in the RPA is not difficult to understand. While respondents assert (Res. Br. 26, n. 13) that the RPA and the immunity from criminal and civil liability afforded the Bureau by the opinion's Incidental Take Statement are "separate and distinct" (apparently for the sole reason that the RPA appears at J.A. 86-92 while the Take Statement appears at J.A. 92-96) they fail to mention that the Take Statement was described by the FWS itself as a statement of "Incidental Take *Under Reasonable and Prudent Alternative*." (J.A. 92, emphasis added) Not surprisingly, respondents also concede that, "as a practical matter" action agencies are unlikely to risk criminal and civil penalties by deviating from the take statement (Res. Br. 26, n. 13) and that they "very rarely" choose to engage in conduct determined by the FWS to cause jeopardy to a listed species (*Id.*, 21). In fact, respondents fail to cite even a single example of action agency deviation from the terms of a biological opinion – hardly the track record one would expect of a truly "independent" third party.

Nonetheless, in pursuit of their "independent" action agency theory, respondents propose to bar all future direct challenges to biological opinions issued by the FWS. (Res. Br. 22-24) Instead, only litigation against "action agencies" would be allowed, with the "rationality" of the FWS' biological analysis tested indirectly through a judicial determination of the propriety of the action agency's decision to proceed in reliance upon the opinion. (*Id.*) In short, an agency without notable biological expertise would be required to defend a biological opinion which it did not author, with which it may harbor internal disagreement and for which it was provided only a truncated administrative record (Res. Br. 24, n. 12). This convoluted process would not further Article III's purpose of ensuring real "cases or controversies".[4]

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[4] Such a result is certainly not mandated by *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 446 U.S. 765 (1984) (Res. Br. 23, n. 11). Not only was *Escondido* driven by the specific procedures mandated by Congress in Section 4(e) of the Federal Power Act (16 U.S.C. 797(e)) but the Court's rationale – that the Commission had no discretion to change the conditions set by the Secretary of the Interior (466 U.S. at 778) is flatly inconsistent with respondents' argument regarding the powers of an "action agency" under the provisions of the ESA.

C. Respondents also argue that the injury suffered by petitioners will not be redressed by a favorable judicial ruling. (Res. Br. 26-29) More specifically, they assert that it is "purely speculative whether a judicial order running against the FWS would enable petitioners to obtain additional water." (*Id.*, 27) In essence, their contention is that even if the courts overturn the minimum reservoir level restrictions in an action brought against the FWS, the Bureau itself could simply decide to re-operate the Klamath Project in accordance with such restrictions. These contentions are wide of the mark in several respects.

First, the Bureau has already indicated how it would operate the Klamath Project in the absence of the biological opinion. While some 20 mitigation measures would be employed to protect endangered species, *none* would entail operating the Project to minimum reservoir levels. (J.A. 21-31) Further, any judicial order that is issued would not run simply against the FWS. The Complaint herein also names the Secretary of Interior as a defendant. If, as respondents contend, an action against the Secretary also binds the FWS (Res. Br. 24, n. 12) then such an action would be equally binding upon the Bureau – a co-equal agency within the Department of Interior, that also reports to the Secretary. In short, the notion that the Bureau would simply elect to operate in accordance with restrictions it had never before proposed and which had been invalidated in an action binding upon the Secretary is, itself, nothing more than doubtful speculation.

Equally dubious is respondents' assertion that, to satisfy Article III requirements, petitioners must demonstrate that a judicial order running against the FWS would enable them to obtain more water. According to the Ninth Circuit, petitioners are in competition (with the fish) for the limited water supplies available in Gerber and Clear Lake reservoirs. (Pet.App.

16) In such circumstances, it is not necessary for petitioners to show they would obtain more *water* but for the biological opinion; instead, it is enough to show that if the FWS follows the law by considering the economic consequences of its actions, petitioners will be in a better position *to compete* for the limited water available. (*Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. ___, 124 L.Ed.2d 586, 597 (1993); *Regents of University of California v. Bakke*, 438 U.S. 265, 280- 81, n. 14 (1978)). Here, the legislative history of the amendments which added the economic balancing obligations invoked by petitioners indicates they were incorporated into the ESA precisely for the purpose of providing a more level playing field when consultations are undertaken and critical habitat determinations are made. (See Pet. Br. 32, 38)

Finally, it is significant that each of the claims asserted by petitioners is in the nature of a procedural right. Petitioners have a right to protect their contract-based interest in the Klamath Project by requiring respondents to undertake procedures which involve: (1) consideration of the economic impact of designating critical habitat[5] (16 U.S.C. 1533(b)(2)); (2) consideration of the economic feasibility of an RPA in the event of a jeopardy finding (16 U.S.C. 1536(b)(3)(A)); (3) the use of scientific data in fulfilling the consultation requirement (16 U.S.C. 1536(a)(2)); and (4) the resolution of water resource issues in concert with the conservation of endangered species (16 U.S.C. 1531(c)(2)). As recognized in

[5] Respondents assert that the obligation of the Secretary to take economic impacts into consideration when specifying critical habitat applies only to the "official designation" of critical habitat pursuant to Section 4 of the ESA. (Res. Br. 38 n. 23) Nowhere does the Act make such a distinction. Moreover, since the "official designation" of critical habitat for the Lost River and shortnose suckers cited by respondents (59 Fed. Reg. 61744) is constructed around the same minimum reservoir level concept found in the biological opinion, respondents' assertion is nothing more than an invitation to authorize the Secretary to do in a biological opinion that which he could *not* do otherwise; *viz*, designate critical habitat unaccompanied by the burden of an economic balancing procedure.

Lujan,, supra, these procedural rights are special and may be asserted *without* meeting the standards for redressibility normally applicable under Article III. (119 L.Ed.2d 351, 372 n. 7)[6]

II. RESPONDENTS' STATUTORY INTERPRETATION ARGUMENTS SHOULD BE REMANDED TO THE LOWER COURTS

A. Respondents' argument that the citizen suit provision of the ESA only authorizes suits against *regulated parties* (i.e., federal "action agencies" or private parties) but not *regulators* like the FWS or the Secretary, is contrary to the plain language of the citizen suit provision itself. Section 1540(g)(1)(A) authorizes suit against, "*any person*, including the United States and any other governmental instrumentality or agency." (Emphasis added) In turn, the Act defines "person" to include "*any* officer, employee, agent, department or instrumentality of the Federal Government." (16 U.S.C. 1532(13), emphasis added) Thus, the FWS and the Secretary fall within the literal scope of the "persons" subject to suit under the ESA.

The ESA's citizen suit provision also does not distinguish between the *types* of violations which may be redressed.

[6] Respondents assert three reasons for the inapplicability of *Defenders of Wildlife* footnote 7 standing to the present case. (Res. Br. 29, n. 15) Two of these involve Article III standing considerations ("independent action by a third party not before the court" and "injury in fact") already responded to hereinabove. The third reason is the contention that petitioners should be required to assert their procedural challenges only after the Bureau has made its final decision regarding the allocation of Klamath Project water. Here, however, petitioners did *not* commence this litigation until *after* the Bureau had already indicated its intent to abide by the provisions of the biological opinion. (Res. Br. 27, n. 14) If respondents are asserting that petitioners must delay seeking injunctive relief until after they have already suffered harm, the law of this Court is decidedly to the contrary. (E.g., *Swift & Co. v. United States*, 276 U.S. 311, 326 (1927); *Reynolds v. Int'l Amateur Athletic Federation*, 505 U.S. 1301 (1992) (Opn. of J. Stevens, Circuit Judge, staying court of appeals decision denying relief).

Instead, the statute simply provides that persons may be sued who are "in violation of *any* provision of this chapter or regulation thereunder." (16 U.S.C. 1540(g)(1)(A), emphasis added)[7] Thus, respondents' suggestion that "enforcement" violations but not "implementation" violations are covered by the citizen suit provision (Res. Br. 39) finds no support in the statutory language. (See, *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980), statute authorizing judicial review of "any other final action" means "exactly what it says, namely, *any other* final action." (Emphasis in original)) Moreover, since Congress also authorized suit for the violation of any ESA "regulation" (16 U.S.C. 1540(g)(1)(A)) and since agency regulations invariably concern the administration and implementation of the regulatory statute, the language of the citizen suit provision, itself, rebuts respondents' artificial distinction between implementation and enforcement violations.[8]

Applying respondents' proposed cognizability distinctions also leads to anomalous distortions of the statutory language. For example, when the FWS is an "action agency," it could be sued under section 1540(g)(1)(A) according to respondents, but not when the FWS acts as the administrator

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[7] The Government's concession that "[c]onduct by the Secretary that is inconsistent with [ESA] provisions might in a sense be said to constitute a 'violation' of the Act or regulations," (Res. Br. 39) is an understatement. That is the *common sense* understanding of to be "in violation of." (Cf. *TVA v. Hill*, 437 U.S. 153, 168, 172-174 (TVA "in violation of" section 7 of the ESA by not taking action to avoid jeopardy to endangered species as required by section 7)

[8] The Secretary has adopted regulations governing section 7 interagency consultation. (50 C.F.R. sections 402.01-.16) Section 7 and these regulations confer rights upon private permit applicants against the FWS. See, e.g., 16 U.S.C. 1536(b)(1)(B); 50 C.F.R. sections 402.14(e), 402.14(g)(5). Under the Government's interpretation, the violation of a section 7 regulation *by the FWS* would be exempt from the citizen suit provision but the violation of a section 7 regulation *by an "action agency"* would be cognizable under section 1540(g)(1)(A) even though the statutory language authorizes suit for the violation of "any" regulation.

of the ESA. Thus, the FWS would sometimes be a "person" under the citizen suit provision and sometimes not. Similarly, respondents admit that the Secretary's violation of section 7 requirements would be subject to APA review under 5 U.S.C. 706(2)(A). One basis for invalidating agency action under section 706(2)(A) and thus establishing "arbitrary and capricious" administrative conduct, is to show that the agency action is "not in accordance with law;" i.e., that it violates the ESA. Thus, under respondents' argument, the Secretary's violation of the ESA would constitute action "not in accordance with law" for purposes of APA review, but not action "in violation of" the ESA for purposes of the ESA's citizen suit provision. Whether one focuses on the "any person" or "in violation of any provision" language of the citizen suit provision, the judicial review scheme proposed by respondents makes a shambles of the statutory language.

Significantly, prior suits alleging that Secretarial violations of the ESA's administration are cognizable and remediable under the citizen suit provision, have not been questioned. For example, in *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. ___, 132 L.Ed.2d 597 (1995) and *Lujan v. Defenders of Wildlife*, *supra*, the citizen suit provision was used as a vehicle for challenging the Secretary's adoption of regulations implementing section 7 (*Lujan*) and section 9 (*Sweet Home*). Neither the Government nor this Court raised any concern that such challenges to the Secretary's administration of the ESA were not cognizable under the plain meaning of the citizen suit provision.[9]

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[9] See *Lujan*, *supra*, 504 U.S. 555, 571-572; *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1037-1038 (8th Cir. 1988) (describing section 1540(g)(1)(A) claim that the Secretary violated section 7(a) in adopting the regulation at issue in *Lujan*); Joint Appendix in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859, at 17, ¶ 2; 24-26 (complaint allegations), 30 ¶ 2 (Government's answer admitting jurisdiction under the ESA citizen suit provision, 16 U.S.C. section 1540(g)). Other citizen suits have been brought under section 1540(g)(1)(A) alleging that FWS biological opinions have been issued in violation of the ESA. (See *Mausolf v. Babbitt*, 913 F.Supp. 1334, 1344 (D.

Ordinarily, one should "give [ ] effect to the 'deliberately expansive' language chosen by Congress," (*District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992), quoting *Pilot Life Ins, Co. v. Dedeaux*, 481 U.S. 41, 46 (1987)) and "accord it a sweep as broad as its language." (*United States v. Price*, 383 U.S. 787, 801 (1966)). "[O]nly the most extraordinary showing of contrary intentions [from the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." (*Garcia v. United States*, 469 U.S. 70, 75 (1984); see, also, *Rubin v. United States*, 449 U.S. 424, 430-31 (1981)). In this regard, it is important to recognize that section 1540(g)(1)(A) was part of the original 1973 ESA legislation and there is nothing in the legislative history indicating any intent to exclude Secretarial or FWS violations of the ESA from the broad scope of the citizen suit language.[10] Nor is there any evidence that APA review of Secretarial action was intended to substitute for suits against the Secretary under the ESA.[11]

Minn. 1996); *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 929 (D. Mont. 1992); *Westlands Water District v. United States*, 850 F.Supp. 1388, 1424 (E.D. Cal. 1994))

[10] House Report 412 said only that the citizen suit provision authorized suits "to enforce the provisions" of the ESA, and allowed injunctive relieve "for violations or potential violations of the Act." (See H.R. Rep. 412, 93d Cong., 1st Sess. 19 (1973); see, also, S. Rep. 307, 93d Cong., 1st Sess. 11 (1973) (citizen suits permit "private actions to enforce the provisions of this Act."))

[11] The 1973 Conference Committee rejected provisions of the Senate bill which provided for modified APA procedures and judicial review. (See H.R. Conf. Rep. No. 740, 93d Cong., 1st Sess. (1973); 1973 U.S.C.C.A.A.N. (93 Stat.) 3003-4) Instead, the Conference Committee included some of those APA-type procedures in section 4 of the ESA, and adopted the House approach of making no reference to APA review in the legislation thereby permitting APA review by default. (*Id.*; see also, *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. 221, 231 n. 4 (1986). The 1973 legislation also included a "savings clause" in 16 U.S.C. 1540(g)(5) which provides that injunctive relief under the citizen suit provision shall not restrict remedies under any other statute or the common

Thus confronted with an unsupportive legislative history, respondents attempt to narrow the scope of the citizen suit language of section 1540(g)(1)(A) enacted in 1973, by pointing to the purportedly negative implications to be drawn from other ESA provisions added to the ESA *after* 1973. Such negative implications, however, are a weak basis for disregarding the plain meaning of a statute. (See *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Adams Fruit Co. Inc. v. Barrett*, 494 U.S. 638, 644-45 (1990); *Sullivan v. Hudson*, 490 U.S. 877, 891-92 (1989)). The fact that section 1540(g)(1)(C) was subsequently added to the ESA in 1982 to ensure judicial review of nondiscretionary acts or duties of the Secretary under section 4 (16 U.S.C. 1533) hardly indicates that Congress intended it to be the exclusive means by which to challenge Secretarial violations of the ESA.[12] Section 1540(g)(1)(A) is a broad provision

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law "including relief against the Secretary." Thus, while Congress was aware that APA review would be available, there was no intent to restrict the scope of section 1540(g)(1)(A) because of any supplemental APA remedies; instead, the "savings clause" indicates an intent to preserve *multiple* avenues of judicial review, including ones against the Secretary.

[12] The 1982 ESA amendments imposed nondiscretionary deadlines for listing and other actions by the Secretary under section 4. Previously, there were no deadlines for such actions, and consequently the timing of such action was purely "discretionary" with the Secretary. (See H.R. Conf. Rep. No. 835 97th Cong., 2d Sess. 20 (amendments "replace the Secretary's discretion with mandatory, nondiscretionary duties") Section 1540(g)(1)(C) simply ensured that these nondiscretionary deadlines would be judicially enforced. (See S. Rep. 418, 97th Cong., 2d Sess. 4 ("by imposing upon the Secretary a mandatory, nondiscretionary duty to make and publish decisions . . . to list or delist, [the bill] would force judicially reviewable action") Congress may have chosen not to rely upon the existing section 1540(g)(1)(A) as a means of judicial enforcement simply to avoid any uncertainty whether the Secretary's failure to act constituted action "in violation of" the ESA under section 1540(g)(1)(A). (Cf. H.R. Conf. Rep. 1804, 95th Cong. 2d Sess. 26 (1978) (1978 amendment clarifying language in the penalty provisions of the ESA "to make it clear that [the act's] sanctions apply to violations involving an omission or failure to act as well as to violations involving the commission of a

covering *any* violations of the ESA or its regulations by *any* government official, whereas section 1540(g)(1)(C) is more narrowly targeted at the nondiscretionary acts and duties of the Secretary under section 4 of the Act. Any partial overlap between the two provisions has little significance. Redundancy is only an issue when two statutes *enacted at the same time* are rendered duplicative. (*Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 839, n. 14 (1988)). A partial overlap between statutes enacted at different times is understandable because "[r]edundancies across statutes are not unusual events in drafting." (*Connecticut National Bank*, *supra*, 503 U.S. at 253). In such circumstances, the primary canon of statutory construction is *not* the avoidance of redundancy but giving effect to the plain meaning of the language used (*Id.*, at 253-54) particularly where, as here, any redundancy can be explained by uncertainty over the coverage of different statutes. (See, *International Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 81-82 (1991)).[13]

When Congress intended for judicial review of ESA administrative activity to take place exclusively under the

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prohibited act")). Moreover, contrary to the Government's narrow reading of the scope of section 1540(g)(1)(C), the legislative history indicates that review of "nondiscretionary acts" under section 4 would include review of the sufficiency of the scientific evidence upon which section 4 decisions were based. (See H.R. Conf. Rep. No. 835, *supra*, at 21, 23; S. Rep. No. 418, *supra*, at 13-14).

[13] The Government's own argument also fosters redundancy because a litigant could challenge the Secretary's failure to comply with a nondiscretionary section 4 duty under both section 1540(g)(1)(C) and the APA. Even more importantly, Congress, in section 1540(g)(5) ensured duplicative judicial remedies when it expressly provided that ESA injunctive relief would not preclude a litigant from pursuing any other relief "including relief against the Secretary" under any other statute or the common law. Any marginal redundancy between sections 1540(g)(1)(A) and 1540(g)(1)(C) should not be a vice when Congress made such redundancy a virtue in section 1540(g)(5), and when the Government's own scheme of judicial review *assumes* such redundancy.

APA, it knew how to say so. Thus, for example, in section 1536(n), Congress provided for APA review in the courts of appeal of exemption decisions by the Endangered Species Committee. This specialized judicial review provision suggests that if Congress had intended *other* administrative actions under the ESA to be subject exclusively to APA and not citizen suit enforcement, it would have specifically so provided. Respondents' attempted analogy to the citizen suit provision of the Clean Air Act (42 U.S.C. 7604) relies on language found in the Clean Air Act which is not present in the Endangered Species Act. Unlike the ESA, the Clean Air Act *specifies* that the administrator's implementation of the Act *should not be subject to judicial review via the citizen suit provision*. (See 42 U.S.C. 7607(e)). Because the ESA contains no comparable provision, the opposite inference is appropriate for the ESA.[14] (See *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. ___, 131 L.Ed.2d 166, 169-70 (1995)).

Importantly, respondents offer no *policy* reasons why Secretarial violations of the ESA should not be covered by the citizen suit provision. Instead, they concede that essentially the same type of review would be available under the APA. Because the dispute here is uncomplicated by any policy concerns, we thus end where we began: with the plain language of a citizen suit provision which says that "any person" can sue "any person," including government officials, who are in violation of "any provision . . . or regulation" of the ESA. The Court should not "seek ingenious analytical instruments" to read exemptions into this broad language. (*Price*, *supra*, 383 U.S. at 801)[15] Nor should it narrow the plain

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[14] In addition, the Clean Air Act citizen suit provision also specifies the particular types of violations covered by the provision. (See 42 U.S.C. 7604(a)(1)) By contrast, section 1540(g)(1)(A) of the ESA is much broader and allows suit for violations of "any" ESA provision or regulation.

[15] For example, contrary to respondents' suggestion, the fact that the 60-day notice provision in section 1540(g)(2)(A) provides for notice to

meaning of this language on the basis of some "gestalt judgment" about Congress' conceivable intent. (*Garcia*, *supra*, 469 U.S. at 78)

B. Respondents' companion argument that the FWS' biological opinion is not subject to APA review until the Bureau issues a final water allocation decision for the Klamath Project, goes well beyond any "finality" requirement in this Court's cases, including *Franklin v. Massachusetts*, 505 U.S. 788, 120 L.Ed.2d 636 (1992) and *Dalton v. Specter*, 511 U.S. ___, 128 L.Ed.2d 497 (1994). The "core question" for finality is two-pronged: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." (*Franklin*, *supra*, 120 L.Ed.2d at 648) Both requirements are satisfied in this case.

First, there is no question that the FWS took final action on the biological opinion, thereby concluding the section 7 consultation requested by the Bureau. (See 50 C.F.R. 402.14(l)(1)) Moreover, even assuming the Bureau was not "legally obligated" by the terms of the ESA to automatically comply with the biological opinion, the Bureau, in fact, made a decision to do so. (See Res. Br. 27-28, n. 14) Once the Bureau committed to comply with the biological opinion, the decisionmaking process on the biological opinion was final as to *both* the FWS and the "action agency," the Bureau. This fact distinguishes the present case from *Franklin* and *Dalton*, *supra*. In both of those cases there was a second decisionmaker (the President) who had not yet decided whether to adopt the decision or follow the recommendation made by a subordinate agency, and who retained authority to change or

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both the Secretary and "any . . . violator" does not mean that the Secretary or the FWS cannot be a "violator." The notice provision was simply drafted to be inclusive and to cover the situation where the violator is someone other than the Secretary. Where, as here, it is the FWS' conduct which is at issue, separate 60-day notices would be sent to the Secretary and to the particular Fish and Wildlife Service official who was the actual "violator" who approved the biological opinion or engaged in the particular section 7 consultation being challenged. (Sec. J.A. 2)

modify the agency decision or recommendation. Here, on the other hand, the Bureau has already made a definitive decision, on the record, to abide by the biological opinion. Any later water allocation decision necessarily *assumes* compliance with the opinion and *then* factors in other variables – such as how much precipitation occurred or is projected, current water storage, priorities among contractors, etc. Thus, insofar as the biological opinion was concerned, the decisionmaking process was complete, and the first prong of *Franklin* satisfied, once: (1) the FWS issued its biological opinion in final form and (2) the Bureau committed to comply with it.

The second *Franklin* prong – whether the result of the decisionmaking process will directly affect petitioners – is also satisfied. How much water a particular contractor will receive from the Klamath Project depends upon a number of factors. For example, whether a year is wet or dry will affect not only the amount of water that a contractor receives, but may also determine whether an allocation decision might be modified during the course of the season. However, once the Bureau committed to complying with the biological opinion, it became certain, at that moment, that *part* of the water in the Project would be allocated *first* to the endangered fish rather than anyone else. The Bureau's commitment to implement the biological opinion meant that specified "minimum pools" of water would be left in Gerber and Clear Lake reservoirs for the fish and that the Project's contractors would only have a claim to the water remaining *after* these minimum pools were established. The fact that the Bureau would make a later water allocation decision for each contractor based on additional factors (such as the amount of precipitation, storage and priority) does not change the fact that once the Bureau committed to the biological opinion, petitioners suffered an immediate and direct injury: whatever amount of water nature bestowed upon southern Oregon, a significant portion would automatically go "off the top" to the fish, and everyone else would divide only what was left.

This Court has applied the doctrine of finality in a pragmatic fashion and found agency action to be final even when further administrative steps in enforcement or implementation

need to be taken. (See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-152 (1967); (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198-199 (1956); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 417-421 (1942). Utilizing a similar approach in the present case, there is simply no question that the decisionmaking process regarding the biological opinion was complete and that there was an immediate and direct practical impact on the amount of water that petitioners could ever hope to receive from the Klamath Project.

III. RESPONDENTS' PROPOSED SCHEME OF JUDICIAL REVIEW OF ESA ACTION IS FLAWED

Respondents' proposed scheme of judicial review of ESA action has three main flaws. First, respondents give economic interests or resource-user plaintiffs the same disfavored status that such litigants receive under the Ninth Circuit's decision, only respondents do so via their construction of section 1540(g)(1)(A) rather than through a "zone of interest" test. According to respondents, environmental plaintiffs complaining about *under*regulation under the ESA are free to sue "action agencies" under the citizen suit provision, section 1540(g)(1)(A), but resource users complaining of *over*regulation under the ESA have no remedies under section 1540(g)(1)(A) and can only sue under the APA. A similar attempt to take "party-neutral" statutory language and create a dual standard for different classes of litigants was rejected in *Fogerty v. Fantasy Inc.*, 510 U.S. ___, 127 L.Ed.2d 455 (1994).

Respondents say that resource users are not disfavored because they have an APA remedy, and would fall within the zone of interests protected by the relevant *resource* statute (here, the Reclamation Act of 1902). (Res. Br. 50, n. 34) But the relevant statute for purposes of the APA "zone" test is the ESA – "whose violation is the gravamen of the complaint" (*Lujan v. National Wildlife Federation, supra*, 497 U.S. 871, 886) – not the Reclamation Act. Under the Ninth Circuit's holding in this case, resource users, like petitioners, do *not*

fall within the zone of interests of the APA. Therefore, unless the Ninth Circuit's ruling in this case is *reversed* petitioners will have no remedy at all under the APA. Respondents' assurance that resource users will always have a viable APA remedy is thus a false promise.

Second, respondents argue that the FWS can never "overregulate" because even if reasonable and prudent alternatives in a biological opinion go beyond what is needed to avoid jeopardy, federal agencies still have a duty under section 7(a)(1) (16 U.S.C. section 1536(a)(1)) to conserve endangered species; therefore, there is nothing wrong with "overprotective" species regulation. (Res. Br. 46-49, and n. 33) This argument is contrary to the statute, the section 7 regulations, and the position that FWS took when it adopted its section 7 regulations. The duty to avoid jeopardy in section 7(a)(2), and the duty to conserve species in section 7(a)(1) are two separate and distinct duties under the ESA. Biological opinions and reasonable and prudent alternatives apply *solely* to the duty to avoid "jeopardy" under section 7(a)(2), not the duty to conserve species under section 7(a)(1). If the FWS finds that a proposed agency action will not jeopardize species, FWS cannot specify as RPAs various "conservation" measures which might help species. That is why the section 7 regulations distinguish between "conservation recommendations" – which are purely voluntary and separate from RPAs (50 C.F.R. section 402.14(j)) – and RPAs which are based on the jeopardy standard. (*Id.*, sections 402.14(g), (h)).[16]

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[16] When it adopted its section 7 regulations, the FWS rejected comments urging it to use biological opinions to promote species conservation goals. (51 Fed. Reg. 19926, 19934 (1986) ("The Service will not, nor does it have the authority to, mandate how or when other Federal agencies are to implement their responsibilities under section 7(a)(1), nor is the Service authorized to issue a biological opinion under section 7(a)(1) of the Act."); *id.*, ("The commenters' argument would require Federal actions to halt if they failed to conserve listed species, a result clearly not intended by Congress. Congress intended that actions that do not violate section 7(a)(2) . . . be allowed to proceed."); *id.*, ("the Service lacks authority to issue biological opinions under [section 7(a)(1)], and the Act does not

Finally, respondents' notion that the FWS can only be brought into section 7 ESA litigation indirectly through the device of suing the "action agency" rather than the FWS, is needlessly complex. Since the validity of the FWS' biological opinion, its administrative record, and its alleged expertise are in issue, the FWS should be a named party under ordinary principles of administrative law. Certainly when the FWS is alleged to have committed *procedural* violations, it is hard to see why the action agency is "vicariously" responsible for such violations. (See *Dalton*, *supra*, 128 L.Ed.2d 497) Ironically, while respondents say that there is no need to name the FWS in order to obtain full review of the FWS' biological opinion, they insist that *not* naming the Bureau as a defendant is a fatal flaw even though the Bureau's superior, the Secretary of the Interior, is a named defendant. Respondents' arcane scheme of who needs to be named as a defendant and who does not appears to be based less on traditional principles of administrative law, and more on achieving a particular result in this case.

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Respectfully submitted,

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mandate particular actions to be taken by Federal agencies to implement 7(a)(1)")). In commenting on the proposed regulations, the House Committee on the Merchant Marine and Fisheries emphasized that conservation recommendations should be strictly voluntary and separate from a biological opinion, (51 Fed. Reg. 19954), and the FWS agreed: (*Id.*)